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No. 07-842

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ABN AMRO VERZEKERINGEN BV,

Petitioner,

v.

GEOLOGISTICS AMERICAS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ALFRED JAMES, DOING BUSINESS AS ART MESSENGER AND DELIVERY SERVICE

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the petition, where the Petition misrepresents the facts that were found by the District Court and upheld by the Second Circuit Court of Appeals.

II. Whether Petitioners have presented compelling reasons to grant the petition, where the Petition cites to cases which have no application to the case at bar, and the Petition fails to cite to the controlling cases that support the Second Circuit's decision.

III. Whether Petitioners have presented compelling reasons to grant the petition, considering that with regard to respondent Art Messenger, this case involves the decision of New York State law by a Federal District Court and Federal Circuit Court both sitting in New York, and the general rule is that the Supreme Court will defer to an interpretation of pure State law decided by a District Court and a Circuit Court sitting within that State.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Alfred James doing business as Art Messenger and Delivery Service is a natural person. His company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioner has presented no "compelling reasons" for their Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. The Petition seeks review of the Second Circuit's decision concerning Mr. Alfred James d/b/a/ Art Messenger and Delivery Service (hereinafter "Art Messenger"). All issues regarding Art Messenger were decided solely on the basis of New York State law. (Pet. at 5-8). Rule 10 does not provide for any review of a Federal District Court's determination of state law. Sup. Ct. R. 10. Moreover, this Court has held that it will accept the interpretation of state law found by a District Court and a Circuit Court sitting within that State. In fact, the conclusion of the District Court and the Second Circuit are entirely in accord with this Court's pronouncement in its recent *Kirby* decision, and therefore could not possibly be held to be unreasonable. Moreover, the Petition materially misrepresents the facts and law governing the case as decided by the Second Circuit, which this Brief in Opposition ("Opposition") corrects as required by Sup. Ct. R. 15.2. The Second Circuit has correctly decided this case under the applicable law. Accordingly, the there is no "compelling reason" for this Court to grant the Petition, and the Petition should be denied.

FACTS

This case involves the shipment of a printing press from Holland to JFK Airport in New York, with final delivery in Huntington Station, New York. (Pet. App. at 3a-4a). Petitioner is one of two insurers and subrogees of the shipper of the printing press, Halm Industries

Co. Inc. (hereinafter "Halm"). *Id.* The other insurer did not participate in the appeal of the District Court's decision. (Pet. App. at 7a, fn. 3).

Halm hired Geologistics, a freight forwarder, to arrange for shipment of the printing press to Huntington Station, New York. (Pet. App. at 4a). Halm had retained Geologistics to perform similar transportation services over twenty-five times previously. (Pet. App. at 4a). Geologistics' standard terms and conditions covering this shipment were identical to those covering the twenty-five previous shipments it made for Halm, all of which were set forth in Geologistics' invoices issued to Halm. (Pet. App. at 6a). Geologistics' terms and conditions establish that it, as a freight forwarder, was retained to hire carriers to transport the shipment on Halm's behalf, and that it was authorized to bind Halm to those carriers' standard terms and conditions, including those carriers' limitations on liability. (Pet. App. at 22a-23a and 28a-29a). Geologistics' terms and conditions also establish that if Halm gave specific written instructions to Geologistics to seek a higher limit of liability or a higher declared value from the carriers it hires, Geologistics would do so (subject to paying increased freight). (Pet. App. at 29a). Halm never provided any written instructions to Geologistics to hire carriers at a higher liability limit or a higher declared value in this instance or in any other of the twenty-five previous times it hired Geologistics to transport its merchandise. (Pet. App. at 6a).

When the printing press arrived from Holland at JFK Airport in New York, Geologistics hired Art Messenger on Halm's behalf to transport it from the

airport to Huntington Station, New York by truck.[1] (Pet. App. at 5a). Geologistics hired Mr. Alfred James d/b/a Art Messenger and Delivery Service (hereinafter "Art Messenger") subject to Art Messenger's standard terms and conditions, which is the same agreement under which Geologistics had hired Art Messenger on behalf of its clients thousands of times previously. (Pet. App. at 5a). Art Messenger's standard terms and conditions for hire specified that his liability for damage to a shipment would be limited to $50.00 unless specific written arrangements are made in advance to increase the declared value of the cargo (subject to paying increased freight). (Pet. App. at 22a, fn. 14). No specific written arrangements were made on this shipment because Halm had not requested Geologistics to obtain a higher limit of liability for it. (Pet. App. at 6a). Art Messenger picked up the printing press at JFK Airport in New York in his truck, and transported it to Huntington Station, New York. (Pet. App. at 5a). When Art Messenger delivered the printing press, the consignee noted damage. (Pet. App. at 5a). The U.S. District Court for the Southern District of New York held that under New York law, Art Messenger's liability

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[1] The Petition improperly states without any support whatsoever that Art Messenger was a "household effects mover". The District Court never made such a finding. Petitioner has no basis to erroneously imply that Art Messenger's business was limited to transporting household effects. Additionally, the Petition refers to Art Messenger as being "unlicensed". While his New York State license had lapsed the District Court found that he was fully licensed as an interstate carrier. (Pet. App. at 5a fn. 2). Art Messenger was thus fully licensed to transport the cargo at issue to destinations outside of New York. (Pet. App. at 5a fn. 2).

to Petitioner was limited, if any, to $50.00 under Art Messenger's standard contract that Geologistics had agreed to on Halm's behalf. (Pet. App. at 71a). The United States Court of Appeals for the Second Circuit affirmed this holding. (Pet. App. at 33a).

REASONS FOR DENYING THE PETITION

The facts in this case are fully stated in the District Court's decision, and both the District Court and the Second Circuit properly interpreted and applied the applicable law. The Petition does not contain any argument that the District Court and the Second Circuit made any erroneous findings of fact. Accordingly, the facts as found by the District Court and the Second Circuit are binding upon Petitioner.[2] Every single case cited to by Plaintiff with regard to Art Messenger in the Petition does not apply to the facts in this case. Overall, there are simply no "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. New York State Law Governs This Case And Supports The Judgment Of The Second Circuit

The District Court and the Second Circuit both ruled that only New York law, and not Federal law, applies to this case. (Pet. App. at 7a, fn. 4). Nevertheless, all but one of the cases the Petition cites with regard to Art Messenger involve interstate carriage under the

[2] The factual allegations in the Petition lack any citation to the record and are unreliably stated. A correct and fully cited factual recounting of the events in this case is provided in this Brief in Opposition.

auspices of the Federal Interstate Commerce Commission and the Federal Carmack Amendment. *New York, New Haven & Hartford RR Co. v. Nothnagle*, 346 U.S. 128, 129-30 (1953) (passenger baggage claim on rail trip between Connecticut and Massachusetts under the jurisdiction of the Interstate Commerce Commission and the Carmack Amendment); *Union Pacific RR. Co. v. Burke*, 255 U.S. 317, 318-19 (1921) (rail shipment from California to New York under the auspices of the Interstate Commerce Commission); *Galveston Etc. Ry. Co. v. Woodbury*, 254 U.S. 357, 358-60 (1920) (passenger baggage claim on rail trip between Canada and Texas under the Carmack Amendment); *N.Y. Central & Hudson River RR Co. v. Beaham*, 242 U.S. 148, 149 (1916) (passenger baggage claim on rail trip from New York to Missouri under auspices of Interstate Commerce Commission); *Boston & Maine RR. Co. v. Hooker*, 233 U.S. 97, 106 and 110 (1914) (passenger baggage claim on rail trip from Massachusetts to New Hampshire under the Carmack Amendment); *Missouri, Kansas & Texas Ry. v. Harriman*, 227 U.S. 657, 664 and 667-68 (1913) (shipment of cattle from Missouri to Oklahoma under the Carmack Amendment); *Mechanical Technology Inc. v. Ryder Truck Lines*, 776 F.2d 1085, 1086-87 (2d Cir. 1985) (shipment from New York to Texas under the auspices of the Interstate Commerce Commission); *Alacon Auto Transport Inc. v. State Farm Mut. Ins. Co.*, 537 F.2d 648, 651-53 (2d Cir. 1976) (shipment of automobile from South Carolina to California under the auspices of the Interstate Commerce Commission); *Caten v. Salt City Movers & Storage Co.*, 149 F.2d 428, 430 (2d Cir. 1945) (shipment of household goods from New York to Rhode Island under the Interstate Commerce Act); *Hartzberg et al. v. N.Y. Central RR Co.*,

181 Misc. 129, 129 (1943), *aff'd* 268 App. Div. 904 (1944), *aff'd* 295 N.Y. 703 (1946), *cert. denied*, 328 U.S. 849 (1946) (passenger baggage claim on rail trip from Michigan to Ohio under the Interstate Commerce Act). The only other case that Petitioner cites is a case involving international shipment of cargo from New York to Java by steamship prior to enactment of the U.S. Carriage of Goods by Sea Act, 49 Stat. 1207 (1936). *The Merauke*, 31 F.2d 974, 974 (2d Cir. 1929). None of these cases apply to the case at bar. None of the federal cases cited by Petitioner involve an instance where a shipper hires a freight forwarder to arrange shipment on its behalf, which is what occurred in this case. (Pet. App. at 4a).

Petitioner's erroneous citation to federal cases to argue that it did not have a "fair opportunity" to declare a higher value for his cargo is entirely frustrated by the facts in this case as found by the District Court and affirmed by the Second Circuit. Petitioner had ample opportunity to declare a higher value and get a higher liability limit by merely giving notice in writing to Geologistics that it would like Geologistics to obtain a higher liability limit from the carriers it hired (subject to paying additional freight), as specified in Geologistics' terms and conditions. (Pet. App. at 29a). Halm never provided any written instructions to Geologistics to hire carriers at a higher liability limit or a higher declared value in this instance or in any other of the twenty-five previous times it hired Geologistics to transport its merchandise. (Pet. App. at 6a).

Remarkably, Petitioner has entirely failed to cite to the most recent Supreme Court case that would apply (had Federal law applied), which held that shippers are

bound by the contractual liability limitations of carriers that their freight forwarder procures on their behalf. *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 34 (2004) ("an intermediary binds a cargo owner to the liability limitations it negotiates with downstream carriers"). The Petition omits *Kirby* even though the Second Circuit specifically cited to *Kirby*. (Pet. App. at 21a).

The District Court and the Second Circuit both ruled that only New York law, and not Federal law, applies to this case. (Pet. App. at 7a, fn. 4). Petitioner has no basis under New York Law to argue that Art Messenger was required to issue a bill of lading for this shipment. The Second Circuit found that Under Section 181 of the New York Transportation Law, a common carrier is only obligated to issue a bill of lading "on demand". (Pet. App. at 26a). The District and Second Circuit found no evidence that anyone ever demanded a bill of lading from Art Messenger for this shipment. (Pet. App. at 26a). Accordingly, Petitioner has no basis to argue that Art Messenger's non-issuance of a bill of lading has any relevance to limitation of liability.

New York courts have held specifically that the shipper is bound by the liability limits in contracts freight forwarders make with carriers on the shipper's behalf. *Nelson v. Hudson River Railroad Co.*, 48 N.Y. 498, 509-10 (1872); *Arnold Exhibit & Design, Inc. v. ABF Freight System, Inc.*, 245 A.D.2d 1067, 1067, 667 N.Y.S.2d 556 (4th Dep't 1997); *Yves St. Laurent v. Air Freight Transportation Corp. of New Jersey*, 86 A.D.2d 511, 512-13, 445 N.Y.S.2d 745, 746-47 (1st Dep't 1982); *Northern Assur. Co. Ltd v. Wolk*, 182 Misc. 112, 114, 49 N.Y.S.2d

754, 756 (App. Term 1944); *Lucien Piccard Watch Corp. v. American Airlines, Inc.*, 68 Misc. 2d 664, 666, 328 N.Y.S.2d 74, 76 (Sup. Ct. N.Y. County 1972). This is held to be the inevitable result of the "agency relationship" between a shipper, such as Halm, and a freight forwarder, such as Geologistics. *Yves St. Laurent*, 86 A.D.2d at 512-13. The Second Circuit specifically ruled on this issue. (Pet. App. at 21a). This principle has been well understood in New York for over 130 years. In *Nelson v. Hudson River Railroad Co.*, the New York State Court of Appeals held that even a verbal instruction by the cargo owner to a shipping agent authorizing the agent to deliver cargo to a carrier for shipping binds the cargo owner to the terms of an "ordinary and usual contract" made with the carrier on its behalf, including limitations on the carrier's liability. 48 N.Y. at 509-10; *see, also, Universal Ltd., Inc. v. S. Stern & Co.*, 34 A.D.2d 770, 770-71, 311 N.Y.S.2d 317, 317 (1st Dep't 1970) ("an agent engaged to arrange for shipment of goods, absent express instructions to the contrary from his principal, has authority to enter into the usual and customary shipping contracts which limit a carrier's liability").

The Second Circuit has correctly decided this case under the applicable state law. Accordingly, the there is no "compelling reason" for this Court to grant the Petition, and the Petition should be denied.

II. State Law Decisions Of Federal Circuit Courts Are Given Deference

The decision of the District Court and the Second Circuit with regard to Art Messenger is entirely based upon their interpretation of New York State law. The Supreme Court generally defers to state law holdings in which the District Court and the Circuit Court concur when those courts are located in that state. *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976). *See United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *Propper v. Clark*, 337 U.S. 472, 486-87 (1949) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1946) (on state law questions "we pay great deference to the views of the judges of those courts who are familiar with the intricacies and trends of local law and practice"); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281 (1942) ("we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan"). Accordingly, the decision of the District Judge and Circuit Judges hearing this case, all of whom sit in New York City, should be granted deference concerning their application of New York State law to this case. Accordingly, the there is no "compelling reason" for this Court to grant the Petition, and the Petition should be denied.

III. NY Transportation Law § 111 Was Waived By Petitioner And Was Correctly Decided By The Second Circuit

Petitioner entirely omitted any mention of § 111 of the New York Transportation Law in his Appellate Brief to the Second Circuit. On Oral Argument, Petitioner was admonished for not raising § 111 in his main brief, and instead improperly raising it for the first time on reply. Petitioner was also asked to submit proof to the Second Circuit that he raised § 111 at all in the District Court proceeding. The only mention of § 111 in the District Court was one page in one brief where Petitioner cited to § 111 at the very end of a long string citation. (Memo. of Law In Support of Plaintiff's Motion for Summary Judgment, June 28, 2002, District Court Docket #21, p. 15). The Second Circuit correctly decided that since § 111 was not raised by Petitioner in his main brief, and only raised on reply, it should not be considered. (Pet. App. at 26a, fn. 16); *United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003). In any event, the Second Circuit noted that § 111 imposes liability for damage "caused" or "resulting" from the violation of New York Transportation Law, and found that there is no evidence in the record indicating that the damage "caused" or "resulted from" Art Messenger's expired New York State carrier license. (Pet. App. at 26a, fn. 16). Accordingly, the Second Circuit found that § 111 did not impose liability on Art Messenger in this instance under New York Law. (Pet. App. at 26a, fn. 16). In any event, the text of § 111 concerns itself only with establishing liability, and it does not contain any language that would invalidate a carrier's agreed contractual limit of liability. *New York Transportation Law* § 111. The Second Circuit also noted

that New York State law does not provide that failure to obtain a license will void a contract or contractual limitations of liability contained therein, unless the state legislature intended such a result. (Pet. App. at 25a); *John E. Rosasco Creameries, Inc. v. Cohen*, 276 N.Y. 274, 278, 11 N.E.2d 908 (1937). In the conclusion to the Petition, Petitioner erroneously argues that "This is the first case in the history of the United States wherein an illegal, unlicensed trucker has been permitted to limit his liability". (Pet. at 11). Quite to the contrary, cargo transportation contracts are routinely enforced even in the case of a party's failure to obtain permits and licenses. *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 68 F. Supp. 2d 263, 270 (W.D.N.Y. 1999) (finding that transportation broker's failure to obtain required licensing, in violation of the Interstate Commerce Commission, did not render contract unenforceable); *Concord Industries, Inc. v. K.T.I. Holdings, Inc.*, 711 F. Supp. 728, 729 (E.D.N.Y. 1989) ("[i]n this case, there was nothing intrinsically illegal about the contract between Concord and KTI. The alleged statutory violation is only a technical one; Concord failed to obtain a permit to transport the [cargo] in interstate commerce").

The Second Circuit has correctly decided this case under the applicable law and its decision is entirely uncontroversial. Accordingly, the there is no "compelling reason" for this Court to grant the Petition, and the Petition should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

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